

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 78 of 1981

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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ABBAS MAHOMED ISMAIL BHANA

Versus

ISMAIL MAHOMED ISAP

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Appearance:

MR UDAY VYAS for MR BHARAT J SHELAT for Appellants

None present for Respondents No. 1, 2

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CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 20/07/98

ORAL JUDGEMENT

1. This second appeal under section 100 of Code of Civil Procedure, 1908 is directed against the judgment and decree of District Judge, Bharuch in Regular Civil Appeal No.106/79 decided on 29-12-1980 confirming therein the judgment and decree of Civil Judge, (J.D.), Jambusar in Regular Civil Suit No.203/77 decided on 18-10-1979.

2. The facts leading to this second appeal are to be

briefly stated, which are as under:

In village Sarod of Taluka Jambusar, there are properties bearing village panchayat Nos. 116, 115 and 113. These properties for the sake of convenience are given Lots No. A, B and C. Lot A corresponds to property bearing No.116, which belongs to the plaintiff respondent. Lots No. B & C corresponds to village panchayat No.115 and 113 respectively, which belong to the defendants-appellants. The plaintiff has come up with a case that the open space between lots No.B and C is a way that has been used by him since long. Even the doors of the said two lots abut on the said open space. According to the plaintiff, this open space over which he claims to have a right of way extends towards east and serves as an approach to "Anniwali Khadki" on that side and to a road running north to south. The suit has been filed by the plaintiff for removing of the construction made by the defendants towards east of the way situated between lots B and C admeasuring 6' - 4" from southern wall of lot B towards south.

This suit has been contested by the defendants.

3. After framing the issues and taking evidence of the parties, the trial court decreed the suit of the plaintiff and ordered for removal of the construction made by the defendants. The defendants filed an appeal, which came to be dismissed under the impugned order. Hence this second appeal.

Heard the learned counsel for the appellants.

4. Only contention raised by the learned counsel for the appellants is that in case the disputed way is held to be a public way then the State Government is a necessary party.

5. I fail to see any merits in this contention for the obvious reason that no such issue has been prayed for by the defendants to be framed in the trial court. Be that as it may. From the judgment of the trial court, I find that the defendants have not pleaded their ownership over the land which is claimed by the plaintiff as a way. Once the defendants have not admitted that the disputed land belongs to them on which the plaintiff is claiming the right of way, I fail to see what right they have to raise any construction thereon. Nobody has come forward to claim this land and plaintiff is also not claiming this land to be of his ownership. What he claims is that it is a way leading to the main road and in view of these

facts, if in case the trial court considered it to be a public way, I fail to see how it will cause any prejudice to the defendants-appellants. The matter would have been different where the defendants are able to prove their ownership over the land of some other person and further that they are raising the construction thereon with the prior permission of the owner. In the absence of these pleadings and proof, the defendants-appellants have no right to raise any construction on the disputed land more so where the plaintiff is claiming it to be a right of way. In these facts and circumstances, the learned trial court has not committed any error in passing of the decree for demolition of the construction raised by the defendants-appellants on the disputed land and the first appellate court has rightly confirmed that judgment.

6. No other point has been raised by the learned counsel for the appellants.

7. In the result, this second appeal fails and the same is dismissed. Interim relief, if any, granted by this Court stands vacated. No order as to costs.

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